



CAMPBELL STEPHENSON LLP  
11401 CENTURY OAKS TERRACE  
BLDG. H, SUITE 250  
AUSTIN TX 78758

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**AUG 28 2008**

**OFFICE OF PETITIONS**

In re Application of  
Kevin E. Laracey et al.  
Application No. 09/602,697  
Filed: June 24, 2000  
Attorney Docket No.: **OIC0055US**

**ON PETITION**

This is a decision on the petition filed June 2, 2008 under 37 CFR 1.181 to withdraw the holding of abandonment for the above-identified application.

The petition under 37 CFR 1.181 is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181," or, as explained in more detail below, "...under 37 CFR 1.137(a)" or (b). This is not a final agency decision.

Petitioner asserts that the Restriction Requirement mailed October 18, 2007 and which set the longer of one month or thirty days as the period for reply, should not have been sent by virtue of an election made to a prior requirement and by virtue of a prior filed amendment which cancelled the claims cited in the Restriction Requirement mailed October 18, 2007.

No response to the October 18, 2007 Restriction Requirement having been timely filed, the application became abandoned November 20, 2007. Accordingly, a Notice of Abandonment was mailed May 1, 2008.

Unfortunately however, the requirement for responding to communications mailed from the USPTO must be in writing as is required by 37 CFR 1.2. Petitioners are advised that in the absence of the Restriction Requirement being withdrawn by the USPTO, then by law a response was required. The failure to file a response causes the application to become abandoned, even if the communication mailed from the USPTO was sent in error.

According to the Examiner of Record, there is no evidence that the applicants filed a written response or query as is required by 37 CFR 1.2. Therefore, applicants are not

afforded an opportunity then to withhold a response based on a perceived error on the part of the USPTO. If applicants perceived an error with the Restriction Requirement, petitioners had an affirmative obligation to file a response that no such Election or response should have been required.

In view thereof, the holding of abandonment will not be withdrawn.

## ALTERNATIVE VENUES

Petitioner may wish to consider filing a renewed petition under 37 CFR 1.137(a)<sup>1</sup> or 37 CFR 1.137(b),<sup>2</sup> which now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned

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<sup>1</sup>A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

<sup>2</sup>Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

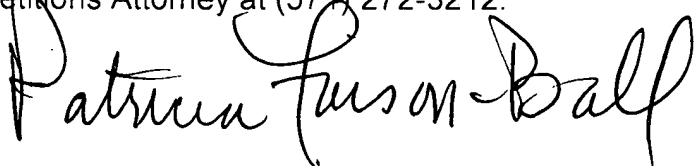
until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:        Mail Stop Petition  
                  Commissioner for Patents  
                  P.O. Box 1450  
                  Alexandria, VA 22313-1450

By FAX:        (571) 273-8300

Telephone inquiries concerning this matter may be directed to the undersigned  
Petitions Attorney at (571) 272-3212.

A handwritten signature in black ink, reading "Patricia Faison-Ball". The signature is written in a cursive, flowing style with large, connected letters.

Patricia Faison-Ball  
Senior Petitions Attorney  
Office of Petitions